

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.289 OF 2006

Vasant Marappa Shetty .. Appellant
versus
The Municipal Corporation of
Gr. Mumbai .. Respondents

...

Mr.Vinay J. Hegde for the appellant.
Mrs.Geeta Jogalekar for respondent.

WITH

APPEAL FROM ORDER NO. 360 of 2006

The Municipal Corporation of
Greater Mumbai .. Appellant
versus
Vasant Marappa Shetty .. Respondents

Mrs.Geeta Jogalekar for the appellant.
Mr.Vinay J. Hegde for the respondent.

CORAM : D.G. KARNIK, J

DATED : 21st August 2006.

ORAL JUDGEMENT :

1. Heard learned counsel for the parties. By consent, heard finally at the stage of admission.

2. These two cross appeals, filed by the plaintiff and the defendant in the suit, are directed against the same order i.e. the order dated 10th March 2006 passed by learned City Civil Judge, Gr. Mumbai on the draft motion in suit bearing Stamp no.698 of 2006. For the sake of convenience, the parties in these appeals are referred to by their status in the original suit.

3. The plaintiff was carrying on business in a wooden stall admeasuring 2.28 meters situated on the footpath of RTO Lane Naka, Lokhandwala Road, Andheri (West), Mumbai. The stall was known as shop no.1 and was situated on the footpath of the public road. On 7th February 2006, the officers of the defendant, the Municipal Corporation of Gr.Mumbai all of sudden and

without any notice to the plaintiff, demolished the stall and seized and took away all the articles therein. According to the plaintiff, he was lawfully carrying on the business in the said stall for many years after obtaining a licence issued by the Inspector of Shops and Establishments as also the temporary permission granted to him by the defendant Municipal Corporation. According to the plaintiff, the action of the defendant and its officers in demolishing the stall without any notice is illegal, contrary to law and contrary to the decision of the Supreme Court in *Olga Tellis Vs. Bombay Municipal Corporation* reported in AIR 1986 S.C. 180. Aggrieved by the illegal action of the defendant, the plaintiff filed a suit in the City Civil Court Bombay for a declaration that the action of the defendant in demolishing the plaintiff's stall without any notice on 7th February 2006 was illegal, unlawful and was a gross abuse of the power and for a mandatory injunction directing the defendant to reconstruct the stall and for restoration of a status quo ante as it existed prior to 7th February 2006. In the suit, the plaintiff took out a motion for an interim mandatory order directing the defendant to reconstruct the stall and restore the status quo ante as it existed prior to 7th February 2006 and also for

return of the articles illegally seized and taken away by the defendant. After hearing the parties and after considering the evidence adduced before it the City Civil Court, by its order dated 10th March 2006, held that the action of the defendant in demolishing the stall without any notice was illegal and contrary to law. It granted a permission to the plaintiff to reconstruct the suit structure of the original size i.e. 6' x 4' with a height of 6 1/2' at the same place as it existed before, subject to the plaintiff obtaining appropriate permission of the defendant Municipal Corporation under the relevant provisions of the Mumbai Municipal Corporation Act (for short 'the MMC Act'). The trial Court further directed the Municipal Commissioner to make an inquiry as to who were the officers responsible for the illegal and unlawful demolition of the plaintiff's structure without following the procedure prescribed by law, and to enter the appropriate adverse remarks in the confidential records of the concerned officers of having acted contrary to the provisions of MMC Act and that to give due weightage to such adverse remarks while considering their case for promotion ,if any, in future. The Court also ordered the defendant to pay costs of Rs.5,000/- .

4. Aggrieved by the part of the order which required the plaintiff to obtain permission of the defendant to reconstruct the stall in its original place and denial of the relief of mandatory injunction directing the defendant to reconstruct the stall at its own expense, the plaintiff has filed appeal no.289 of 2006. Aggrieved by the order of imposition of costs of Rs.5,000/- and also by the direction to the Municipal Commissioner to hold an enquiry to determine who were the officers guilty of illegal and unlawful demolition and to make adverse entries in the confidential records of such officers, the defendant has filed the appeal bearing no.360 of 2006. Since both the appeals are directed against the same order, they are being disposed of by this common judgement.

5. Though initially the plaintiff had contended that his stall was on the private property, at the stage of hearing of this appeal it was conceded that the stall was on the footpath of a public road. Section 3(w) of the MMC Act, defines the street as follows :

"Street" includes a causeway, footway, passage etc, over which the public have

a right of passage or access."

Footway (footpath) is thus a part of the street and therefore, it must be held that the concerned stall was on the street.

6. Section 313 of the MMC Act provides that no person shall, except with the written permission of the Commissioner place or deposit upon any street, any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction or encroachment thereon. Section 314 of the Act empowers the Commissioner to remove any stall, chair, ladder, box, board or shelf or any other thing whatever placed, deposited, projected, attached or suspended in, upon, from or to any street, in contravention of section 313. Doubtless, the Commissioner has a power to remove all illegal structures and stalls made on a street. The only question is whether the Commissioner can remove any stall or structure placed or erected on a street without any notice to the person concerned. Plain words of section 314 no doubt empower the Commissioner to remove the offending structures without notice. Constitutional validity of section 314 of the MMC Act, which empowers the Commissioner to remove any

structure without notice, was challenged before the Supreme Court in the case of Olga Tellis (Supra). While repelling the challenge and upholding the constitutional validity of section 314 of the MMC Act, the Supreme Court held that section only enables and does not command the Commissioner to remove structure without notice. The Supreme Court further held that though the Commissioner has a power to act without notice, such power must be exercised sparingly and only in case of urgency which brook no delay. In all other cases, the Court held, no departure from the audi alteram partem rule (hear the other side) must be presumed to have been intended. The relevant observations found in paragraph nos.44 and 45 of the decision of the Supreme Court are quoted herein below:-

44. The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by Sec.314 of that Act, which provides by clause (a) that the Commissioner may, without notice, take steps for the removal of encroachments in or upon any street, channel, drain etc. By reasons of Sec.3(w), 'street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by Sec.314 is fair and reasonable, we must first determine the true meaning of that

section because, the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, Sec.314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Sec.314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, Sec.314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading Sec.314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Sec.314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

7. It is thus clear that though the Commissioner has the power to remove the structure without notice the power to do so without notice should be exercised only in rare cases where the Commissioner is of the opinion that the action of removal of the structure is so urgently required that issuance of a notice should be dispensed with. In the present case, admittedly no order was passed by the Commissioner

dispensing with the notice nor was the case was so exceptional or so urgent that the structure should have been removed without any notice. It was conceded by the learned counsel for the defendant that no order was passed by the Commissioner himself under section 314 of the MMC Act for removal of the structure. Counsel however submitted that in exercise of the powers conferred u/s.68 of the MMC Act, the Commissioner has delegated the powers of removal of unauthorised structures to various ward officers and senior inspectors operating in their respective wards. Counsel for the defendant also produced for Court's inspection a copy of the order dated 5th September 2005 passed by Dy. Commissioner (Special) exercising powers of the Commissioner authorising Shri N.S. Sankhe to exercise all of the powers of the Commissioner including power u/s.314 of the MMC Act. Counsel for the defendant submitted that in pursuance of this power, it was Mr.Sankhe who demolished the structure of the plaintiff. I have my own doubts whether the Dy. Commissioner, who himself was exercising delegated powers of the Commissioner, could further delegate the powers to ward officers or senior inspectors on the principle of "delegata potestas non potest delegari" Assuming however that Mr.Sankhe had

the delegated power he has not recorded any reasons why the plaintiff's structure was to be demolished without any notice and without granting him any opportunity of being heard. Learned counsel for the defendant submitted that there were complaints received from Karmaveer Dadasaheb Gaikwad Sanskritik Kendra, a public charitable trust (for short 'the trust'), about the illegal activities allegedly committed by the defendant at the suit stall. A copy of the complaint dated 2nd September 2005 was produced before the City Civil Court. The complaint was that people were constantly speaking on the telephone booth of the said stall. There is a vague allegation in the complaint that the telephone conversation related to illegal trafficking in women. At this stage, it may be noted that stall of the plaintiff was in existence for several years. The shop and establishment licence was issued to the plaintiff on 31st August 2001. Similarly a trade licence was also issued to the plaintiff by the defendant municipal corporation itself prior to the year 2001. The licence was renewed from time to time on 30th December 2002, 12th December 2003, 17th March 2004 and 21st December 2005. The licence was valid upto 31st December 2006. Thus on 7th February 2006, the plaintiff was carrying on

business in the suit stall with the permission of the defendant in pursuance of a valid trade licence. In the circumstances, even if there were complaints made against the plaintiff, it was duty of the defendant to issue a notice to the plaintiff before taking any action of demolition. It was not disputed before me that the defendant had not made any enquiry for verification of the truth of the complaint made by the trust. The statements made in the complaint of the trust were believed without verification. It cannot be disputed that any person who is enemical to the plaintiff can make even a false complaint. It was duty of the defendant to verify the truth of the complaint and atleast to give an opportunity of hearing to the plaintiff so that he could rebut the allegations. In the circumstances, I find no error in the conclusion reached by the trial court that the defendant took the action of demolition of the plaintiff's stall illegally and in beach of the principles laid down by the Supreme Court in Olga Telli's case.

8. That takes me to the grievance of the plaintiff that the trial court ought to have granted a mandatory injunction. The relief of injunction is

discriminatory. It cannot be granted as a matter of course. Though the court is not powerless to grant a relief of mandatory injunction even during the pendency of a suit, the Court would generally be slow in granting the relief of mandatory injunction when it relates to doing of a thing which, if done may not be legal. Admittedly, the suit structure was standing on a public street. Under section 313 of the MMC Act, no person has a power to erect any stall or construction on a public street. Public streets are meant for traffic and movement of the people and vehicles. As the structure was on the public street and as the learned Judge has exercised the discretion of not granting a mandatory injunction directing the defendant to erect the stall at its own cost, I do not consider it appropriate, at this stage, to interfere in the discretion exercised by the trial court.

9. As regards the direction issued by the Court to hold an enquiry to ascertain who were the officers responsible for the demolition and to make entries in the confidential records of the concerned officers it would be useful to quote the direction issued which reads thus :

Municipal Commissioner, Greater Bombay, Municipal Corporation shall cause enquiry be made as to who was/were officer/officers responsible for this blatantly illegal and unlawful demolition of the plaintiff's structure without following procedure prescribed by law. He shall enter in appropriate specific adverse remarks into the confidential records of the concerned officer/officers of his/their having acted contrary to the provisions of Bombay Municipal Corporation Act and the law laid down by the Hon'ble High Court. These adverse remarks shall be given due weightage, when considering issue of his/their promotion, if any, in future.

It appears that this direction was issued because the identity of the officer responsible for demolition was not known when the matter was heard by the trial court. At the hearing before me, learned counsel for the appellant stated that the demolition has been effected by Sankhe and a copy of the letter of authorisation issued to him by the Dy.Commissioner authorising him to exercise the powers of the Commissioner u/s.314 of the MMC Act is also produced before me. Since the identity of the officer who ordered the demolition is now known, it is not now necessary to hold an enquiry to ascertain the name of the officer. However as regards the direction to make an entry in the confidential records of the

concerned officer, it appears to me that opportunity of hearing should be given to him before an adverse entry is made. It cannot be disputed and it is not disputed that u/s.314 the commissioner or officer authorised by him u/s.68 of the MMC Act is entitled to demolish the structure with or without notice. Whether the structure should be demolished after notice or without notice would depend upon the facts and circumstances of each case and in particular whether there is any urgency to do so without notice. This has been clearly laid down by the Supreme Court in paragraph nos.44 and 45 of Olga Telli's case (Supra). The officer concerned, Mr.Sankhe, has not been given any opportunity to show cause whether, in view of the complaints received against the plaintiff and other surrounding circumstances, it was necessary to exercise the power of demolition without issuing notice to the plaintiff. If any adverse entry is to be made in his service records an opportunity of hearing must be given to him. He ought to be given an opportunity to show that he exercised the power bonafide and on account of urgency. Therefore, the direction given only to hold enquiry about the identity of the officer without any direction to hold an enquiry whether the officer, acting bonafide, had

formed an opinion to exercise the power of demolition without notice to the plaintiff, cannot be sustained. Therefore, the direction given in paragraph no.4 of the operative part of the impugned order needs modification.

10. For these reasons, appeal no.289 of 2006 filed by the plaintiff is dismissed. Appeal no.360 of 2006 filed by the defendant municipal corporation is partly allowed. The direction given in paragraph no.4 of the impugned order dated 10th March 2006 is set aside and in its place, the following direction is given.

. The Municipal Commissioner shall hold an enquiry whether Mr. Sankhe who demolished the structure without issuing of a notice u/s.314 of the MMC Act, was acting bonafide and had a reason to act without notice on account of an urgency. If the Commissioner comes to the conclusion that there has been a breach of the directions given by the Supreme Court in Olga Telli's case or the power was not exercised by Mr.Sankhe bonafide in the circumstances which required him to act without any notice any

urgently, then the Commissioner shall make an entry in the service records of Mr. Sankhe to that effect and shall further he entitled to take appropriate against him. On the other hand, if the Commissioner comes to the conclusion that the power was exercised bonafide and Mr.Sankhe has complied with the directions of the Supreme Court in Olga Telli's case and in particular paragraph nos.44 and 45 thereof, there would be no need to make any adverse entry in his service records. Needless to say the plaintiff may be permitted to take part and adduce evidence in the enquiry to be held against Mr.Sankhe

11. With these directions, appeals are disposed of.

D.G. KARNIK, J